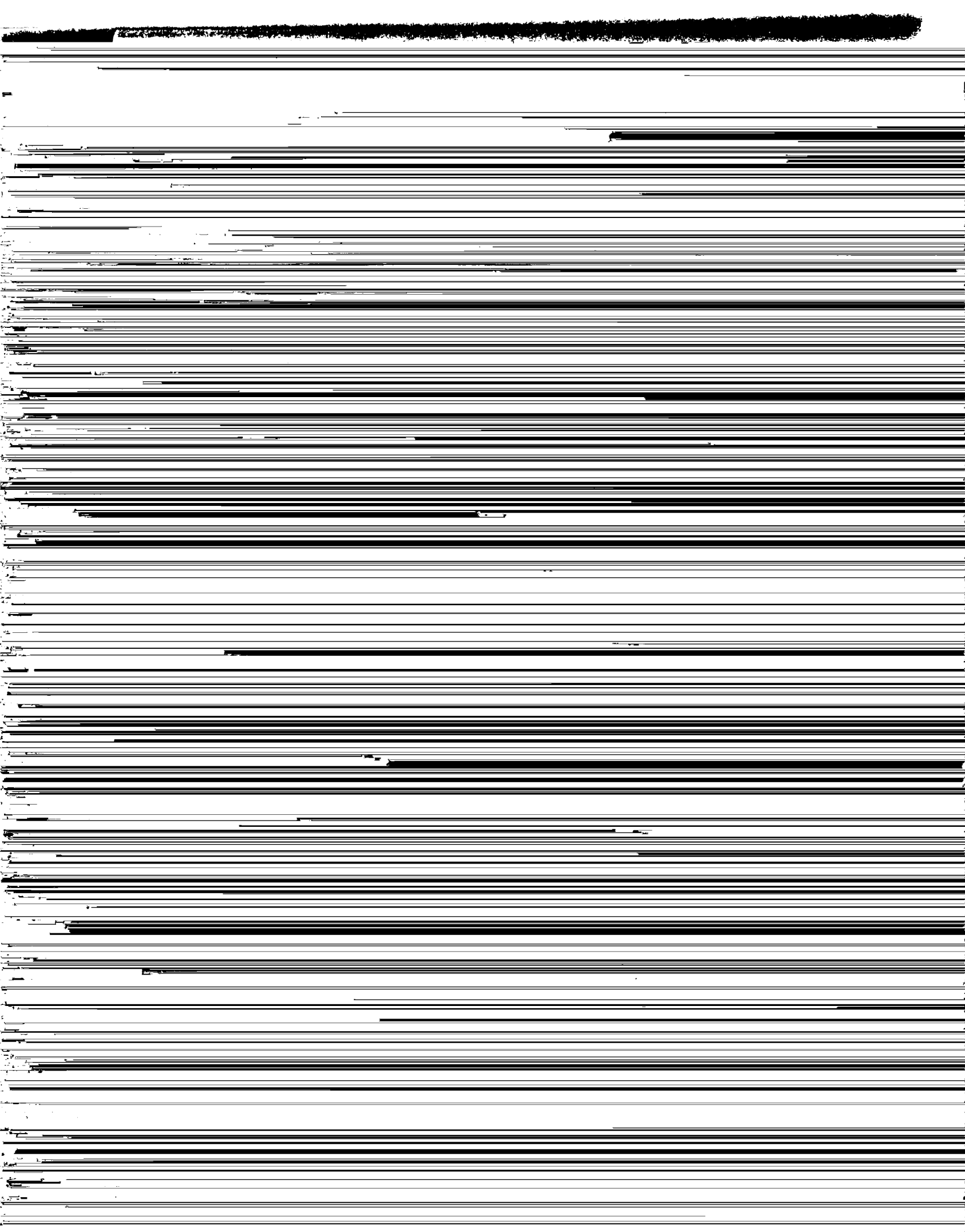
26. The uncontradicted evidence demonstrates that Defendants did not intrude upon Plaintiff's seclusion by publishing private facts with respect to her psychiatric treatment. Defendant Jefferson's comment that "we know someone here who sees a psychiatrist" did not invade Plaintiff's privacy, since she was not identified as the person seeing a psychiatrist, nor could the circumstances surrounding the publication of that statement point to or identify the Plaintiff as the person who was seeing a psychiatrist.

17 In order to hold Defendants liable for



invasion of privacy in pretrial proceedings, and during the tria by Defendants' Motions in Limine, Motion for Compulsory Nonsuit, Motion for Directed Verdict, objections and/or points for charge

WHEREFORE, Defendants, Donald Jefferson, James Quinn, and EZ Communications, Inc., respectfully request this Honorable Court to enter judgment in their favor notwithstanding the verdict.

II. MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT OR, IN THE ALTERNATIVE, TO REMIT DAMAGES

35. The award of punitive damages should be stricken on all counts because there is insufficient evidence t permit a finding that the Defendants' conduct was "outrageous" and/or based upon evil motives or reckless indifference to the rights of the Plaintiff.

36. The award of punitive damages should be stricken on all counts because there is insufficient evidence that Defendants' conduct, considered in light of all of the circumstances, including the motives of the Defendants and the relations between the parties, was malicious, wanton, reckless, willful or oppressive.

37. The jury award of $13,500 for lost wages and $30,704 for medical expenses is duplicative of compensatory damages awarded to Plaintiff for defamation, intentional infliction of emotional distress and invasion of privacy. Moreover, these items were not included in the interrogatories submitted to the jury, and as such are impermissible.

38. The jury award of $13,500 for lost wages is not an appropriate item of damage for defamation, intentional infliction of emotional distress or invasion of privacy; since the count alleging wrongful discharge was dismissed on Defendant's Motion for Compulsory Nonsuit, and since the counts alleging injurious falsehood were withdrawn by Plaintiff at the time of Defendants' Motion for Directed Verdict, an award for lost wages is inappropriate.

39. The jury award of $13,500 for lost wages is in part duplicative of her uncontroverted receipt of $7,500 in severance pay for the same time period, which was awarded previously in an arbitration proceeding and paid to Plaintiff.

40. In considering an award of punitive damages, a jury must weigh the net worth of the Defendants against the character of the the Defendants' conduct to arrive at a figure that will at once punish the Defendants' acts and operate as a deterrent to similar conduct in the future.

41. Upon Defendants' Motion for Compulsory Nonsuit at the close of Plaintiff's case, Defendant EZ Communications was dismissed as a Defendant with respect to all counts of intentional infliction of emotional distress.

42. In this case, Plaintiff introduced no evidence of the net worth of Defendants Quinn and Jefferson, the only Defendants remaining with respect to the counts of intentional infliction of emotional distress.

43. The award of punitive damages against Quinn and Jefferson for intentional infliction of emotional distress in the absence of <u>any</u> evidence of the net worth of those Defendants is improper and should be stricken as a matter of law.

44. In awarding the Plaintiff $292,000 in punitive damages for intentional infliction of emotional distress, the jury must have considered the $89 million net worth of EZ Communications, which had been dismissed from all counts of intentional infliction of emotional distress, rather than the unknown net worth of Defendants Quinn and Jefferson. The punitive award on that count is therefore obviously improper and must be stricken.

45. The combined net worth of Defendants Quinn and Jefferson is approximately $150,000. Consequently, a punitive award against them on the count of intentional infliction of emotional distress in the amount of $292,000, which is almost twice their combined net worth, is clearly disproportionate thereto and must be stricken.

46. The punitive damages awarded for defamation, intentional infliction of emotional distress, and invasion of privacy are highly disproportionate in comparison to the character of the acts and the nature and extent of the harm to Plaintiff, such that the punitive damages awarded to Plaintiff were impermissibly based upon the passion and prejudice of the jury.

47. The uncontradicted evidence established that the jokes at issue were not statements of fact and were therefore not capable of defamatory meaning. As a matter of constitutional law, there can be no separate causes of action, and no separate recovery of damages for, invasion of privacy and intentional infliction of emotional distress claims based on a defective defamation claim. Therefore, if the Court strikes the defamation claim and damages awarded thereunder, it must also strike all compensatory and punitive damages awarded on the other two derivative causes of action.

WHEREFORE, Defendants, Donald Jefferson, James Quinn and EZ Communications, Inc., respectfully request this Honorable Court to enter judgment in their favor, or, in the alternative, to remit all compensatory and punitive damages, and all duplicative damages for lost wages and medical expenses.

III. MOTION FOR NEW TRIAL

48. It is the function of the Court, in the first instance, to determine, as a matter of law, whether a communication complained of is capable of a defamatory meaning.

49. The trial court in the instant dispute abrogated its duty to determine whether any of the jokes were capable of a defamatory meaning in the first instance when it ruled that the issue was for the jury to decide.

50. The uncontradicted evidence established that the jokes at issue were not statements of fact and were therefore not capable of defamatory meaning as a matter of law. The trial court erred in failing to issue binding instructions to the jury on this issue.

51. Where, as here, Plaintiff's claim for intentional infliction of emotional distress is based upon the broadcast of allegedly defamatory comments, and the uncontradicted evidence establishes that those comments were not statements of fact and therefore not capable of defamatory meaning as a matter of law, the trial court erred in not dismissing the claim for intentional infliction of emotional distress.

52. Where, as here, Plaintiff's claim for invasic of privacy is based upon the broadcast of allegedly defamatory comments, and the uncontradicted evidence establishes that those comments were not statements of fact and therefore not capable c defamatory meaning as a matter of law, the trial court erred in not dismissing the claim for invasion of privacy.

53. It is also the function of the Court, in the first instance, to determine, as a matter of law, whether the conduct of the Defendants can reasonably be regarded as so extreme and outrageous as to permit recovery on a cause of acti for intentional infliction of emotional distress.

54. The trial court abrogated its duty to determine whether the conduct of the Defendants was so extreme and outrageous as a matter of law as to permit recovery on a

cause of action for intentional infliction of emotional distress when it ruled that the issue was for the jury to decide.

55. Where, as here, the uncontradicted evidence establishes that the comments at issue were not statements of fact, the trial court erred as a matter of law in charging the jury on actual malice.

56. The trial court erred as a matter of law in charging the jury on the issue of actual malice when it instructed the jury that in order to find actual malice, the Plaintiff must prove that the Defendants have published the statements at issue knowing them to be false or with reckless disregard for the truth or falsity of the statements. It was undisputed at trial that the statements broadcast by the Defendants were not statements of fact. Therefore, a charge on actual malice, which assumes that the statements at issue were statements of fact, and that truth or falsity was an issue to be ascertained, was inappropriate in this case and highly prejudicial to the Defendants.

57. The trial court erred as a matter of law in failing to charge the jury that it should consider the comedic context in which the publications occurred when considering the allegedly defamatory meaning of the jokes.

58. The trial court erred as a matter of law in failing to charge the jury that Plaintiff was not entitled to be compensated for medical expenses relating to her recurrent major depression, since the uncontroverted evidence demonstrated that this portion of her medical expenses was not substantially caused by the actions of the Defendants.

59. The trial court erred as a matter of law in excluding from evidence the relevant sections of the authoritative psychiatric diagnostic manual DSM-III-R, offered by

62. The trial court erred as a matter of law in failing to charge the jury that a communication which is not a statement of fact may not be considered an invasion of privacy based upon publication of private facts.

63. The trial court erred as a matter of law in failing to charge the jury that Plaintiff assumed the risk of injury or consented to it and therefore was precluded from recovering because she was warned in advance about the Defendant but, nevertheless, accepted the job and remained there for over two years. Thus, Plaintiff knew or should have known that the banter concerning sexual themes and the innuendo arising therefrom would be and were a part of the job.

64. The jury impermissibly believed the instant dispute to be a matter of sexual harassment in the workplace and/or involved the community standards of what should be permitted to be broadcast on the radio, whereas neither of these

particularly since Plaintiff's counsel could have, but failed to cross examine "Tex" Meyer on that issue. This error particularly prejudiced the remaining Defendants since "Tex" Meyer was dismissed as a Defendant in the case, and his actions could in no way be attributable to Defendants Quinn and/or Jefferson.

66. Defendants and their counsel were never given full access to all of Plaintiff's psychiatric outpatient progress notes from Western Psychiatric Institute and Clinic. Pursuant to an order entered by Judge Wettick, these progress notes were provided to Defendants' expert who was directed to divulge to Defendants' counsel only those portions of the records upon which the expert relied to form his opinion. Moreover, the session notes of Plaintiff's treating psychiatrist were made fully available only after the trial was half completed.

67. The trial court erred as a matter of law in ruling that evidence regarding Plaintiff's second pregnancy and her abortion was inadmissible at trial. This evidence of events

Communications was $89 million. That instruction obviously prejudiced the jury in awarding punitive damages against Defendants Quinn and Jefferson whose net worth was never presented to the jury.

69. The trial court erred as a matter of law in failing to request the jury to apportion its award of compensatory and punitive damages among the various Defendants.

70. Given the local media attention generated by the instant dispute, the Defendants will be seriously prejudice if a new trial is held in Allegheny County or any nearby county

71. The Defendants will be seriously prejudiced a new trial is held in Allegheny County or any nearby county because Plaintiff's attorneys have been quoted in the February 15, 1990 edition of the Pittsburgh Press that WBZZ has liabili insurance. Therefore, any grant of a new trial must include a transfer to a different venue.

72. Except for the points raised in paragraphs and 71 above, which have come to light only recently, Defendan asserted and preserved their objections, exceptions and ground

for new trial in pretrial proceedings and during the trial by Defendants' Motions in Limine, Motion for Compulsory Nonsuit, Motion for Directed Verdict, objections and/or points for charge.

WHEREFORE, Defendants, Donald Jefferson, James Quinn and EZ Communications, Inc., respectfully request this Honorable Court to enter an Order for a new trial in a different venue.

Respectfully submitted,

KLETT LIEBER ROONEY & SCHORLING

By _____
Foster S. Goldman, Jr.
Meghan F. Wise
Allen Andrascik

Attorneys for Defendants

40th Floor, One Oxford Centre
Pittsburgh, PA 15219

Date: February 23, 1990

Attachment 2

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FCC 91M-1683

In re Applications of	)	MM DOCKET NO. 90-424
WESTERN CITIES BROADCASTING, INC.	)	File No. BRH-891201XU
For Renewal of License of Station KQKS(FM) on Channel 282C1 at Longmont, Colorado	)	
AMADOR S. BUSTOS	)	File No. BPH-900228MB
For Construction Permit for a New FM Broadcast Station on Channel 282C1 at Longmont, Colorado	)	
LONGMONT BROADCASTING CORPORATION	)	File No. BPH-900216MA
For a Construction Permit for a New FM Broadcast Station on Channel 282C1 at Longmont, Colorado	)	
WESTERN CITIES BROADCASTING, INC.	)	File No. BLH-890104KC
For a License to Cover Minor Changes to Station KQKS(FM) Longmont, Colorado	)	

MEMORANDUM OPINION AND ORDER

Issued: May 20, 1991 ; Released: May 22, 1991

1. Under consideration are a Petition to Enlarge Issues filed on March 19, 1991, by Longmont Broadcasting Corporation ("LBC"); an opposition filed on April 3, 1991, by Amador S. Bustos ("Bustos"); an opposition filed on April 3, 1991, by the Mass Media Bureau; and a consolidated reply to oppositions filed on April 11, 1991, by LBC.

2. LBC seeks the addition of a financial qualifications issue against Bustos. In support, LBC notes that Bustos, in certifying his financial qualifications, stated that he was relying on CVC Capital Management Corporation ("CVC") for $400,000 in funds. LBC contends that CVC is a Section 301(d) Small Business Investment Company ("SBIC") regulated by the Small Business Administration ("SBA"). In its reasonable assurance letter to Bustos, CVC stated that financing was subject to several conditions, including the following:

> [R]eceipt by CVC of a representation by you [Bustos] and verification thereof, that you are now, and at the time that CVC loans funds to you, a small business concern which is controlled and managed by socially and economically disadvantaged individuals[.]

LBC argues that Bustos cannot meet this condition because he is not a sociallly or economically disadvantaged individual. Specifically, LBC maintains that Bustos' net worth is over $1 million, that he is highly educated, that he holds significant management-level positions in broadcast stations, and that he resides in a community which is a place of above average affluence. Since Bustos cannot comply with an essential condition of the CVC letter, LBC alleges that he did not have reasonable assurance of funds availability at the time of certification.

3. In his opposition, Bustos argues that he is Hispanic, and that under Section 124.105 of the SBA's Regulations (13 CFR 124.105), Hispanic Americans are deemed to be prima facie socially and economically disadvantaged. In addition, in a declaration appended to his opposition, Bustos states that he discussed his eligibility with CVC president Joerg Klebe, and that Klebe indicated that Bustos was, in fact, an eligible recipient of loan funding by CVC.

4. In its reply, LBC argues that the standards it used in its motion are the standards used by the SBA to determine whether an individual is socially and economically disadvantaged; that the fact Bustos is Hispanic does not automatically make him socially and economically disadvantaged; that the applicable standards are contained in "SBA Policy and Procedural Release #2017" (Revised May 1, 1980), and not in the regulations Bustos cites; and that using those standards, Bustos cannot be considered socially and economically disadvantaged. LBC again maintains that Bustos cannot meet an essential precondition for CVC financing and that the addition of an issue is warranted.[1]

5. The petition to enlarge will be denied; the requested issue will not be added. The proponent of a motion to enlarge issues has the burden of coming forward with a prima facie showing in support of its requested issues. Scott & Davis Enterprises, 88 FCC 2d 1090 (Rev. Bd. 1982). LBC's petition fails to meet this standard.[2] Although LBC argues that Bustos cannot meet the eligibility requirements for an SBIC loan from CVC, LBC has failed to provide the affidavit or declaration of an expert in the field indicating that the loan will not be made, or that Bustos would not be eligible for such a loan. Merely citing a 1980 SBA policy pronouncement is manifestly insufficient since broad, general policies are subject to interpretation on an individual, case-by-case basis. See, e.g., the Commission's Policy Statement on Comparative Broadcast Hearings, 1 FCC 2d 393 (1965), and the myriad of cases interpreting that

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1 LBC also requests that footnote 2 of Bustos' opposition be stricken as it contains ad hominem attacks on LBC's counsel and an LBC principal. The request will be granted. Such personal attacks have no bearing on the questions to be resolved, and do not advance the applicant's cause. They are unprofessional, improper, and should be discontinued. See Tr. 78-79.

2 The Commission has stated that it expects ALJs and the Review Board to "strictly adhere" to the standards it has set for enlarging the issues. Proposals to Reform the Comparative Hearing Process, 6 FCC Rcd 157, 161 (1990).

your client to file. I know from experience that there's a lot of gamesmanship that's played and that's fair, that's legitimate.

You enter into one of these things, it's, you know, all hell breaks loose. I know, but don't call each other names. I don't think it looks good. I don't think it does any of you any credit. And that's all I have to say about that, you know, just let's stop it now before it gets out of hand and we really do have to have Floyd Patterson in here to referee.

Anything else anybody wants to bring up? Yes, Mr. Schattenfield/

Mr. Schattenfield: I have two points.

One, I'd like to be able to save you some work. The documents we produced for you to review in camera, in view of the fact that -- I have a problem with certain things.

Number one, I'm going to have certain witnesses and I can't claim the privilege on -- perhaps and I have to look over -- perhaps I can't claim a privilege on a work production document projection on some of those documents, if these people are going to come and testify. So I am going to review them to see

CERTIFICATE OF SERVICE

I, Deborah J. Hawkins, a secretary with the law firm of Cohen and Berfield, P.C., do hereby certify that on the 19th day of August, 1991, a copy of the foregoing "Reply To Opposition To Petition To Deny" was sent via first class mail to the following office:

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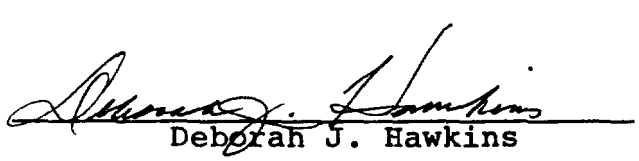

Deborah J. Hawkins